

# Petrobras Court’s Denial of Plaintiffs’ Request for Confidential Treatment of Opt-Out Provisions Could Undermine the Settlement Process



Article By  
[Peter M. Saporoff](#)  
[Joel D. Rothman](#)  
[Mintz](#)  
[Class Action Recovery for Mutual Funds](#)

- [Financial Institutions & Banking](#)
- [Litigation / Trial Practice](#)
- [Securities & SEC](#)
  
- [All Federal](#)

Wednesday, February 14, 2018

On Tuesday, February 6, 2018, United States District Judge Jed S. Rakoff denied class counsel’s request to file under seal three supplemental agreements to a \$2.95 billion settlement in the [Petrobras Securities Litigation](#), and made the side agreements part of the public record. (See [Memorandum Order – Petrobras \(2-6-18\)](#)). This included making public the supplemental agreement that Petrobras could back out of the settlement if more than 5% of the class members opted out. In his order denying the request, Judge Rakoff could not help but find irony in the fact that plaintiffs’ counsel, “who have premised their claim of fraud on defendants’ alleged failure to disclose material information,” was “seeking to keep secret three agreements that are a material part of the settlement.” However, the existence of

the supplemental agreements, and the fact that Petrobras could terminate the settlement if an undisclosed “Opt-Out Threshold” was met, were disclosed publicly in the stipulation of settlement. Keeping secret the percentage of opt-outs needed to “blow up” a settlement is standard practice, and publishing it can embolden opt-out proponents and threaten the stability of settlements.

By way of background, the parties are seeking Judge Rakoff’s preliminary approval of a \$2.95 billion settlement agreement (the “Settlement Agreement”) to which the three supplemental agreements are attached as riders. In December 2014, investors who had purchased [American Depository Shares](#) of Petrobras on the [New York Stock Exchange](#), as well as other securities, filed a securities class action in the [Southern District of New York](#), alleging violations of [the Securities Act of 1933, the Securities Exchange Act of 1934](#), and (in an amended complaint) Brazilian securities laws. Plaintiffs allege that in regulatory filings and public statements, Petrobras misrepresented its financial condition, financial controls, and ethical practices. Petrobras, a Brazil-based multinational energy corporation, is alleged to have allowed collusion among several large construction companies seeking to avoid Petrobras’s competitive bidding process. As a result, it is alleged that Petrobras significantly overpaid for the construction of certain refineries and concealed billions in bribes and kickbacks.

The first two of the supplemental agreements provide escape hatches to Petrobras and its auditor, [PricewaterhouseCoopers Auditores Independentes](#) (“PwC Brazil”) if a certain percentage of the settlement members request exclusion. Specifically, Petrobras may terminate the settlement if members of the Settlement Class that, in the aggregate, have losses equal to or greater than 5% of the class damages request exclusion, while PwC Brazil may render the settlement null and void if more than 5% of the Securities Act Class opts out (the “Opt-Out Threshold Provisions”). Notably, entities that opted out prior to the class settlement being announced are not counted in the 5%, and while Class Counsel sought to keep confidential the 5% threshold, the existence of Petrobras and PwC Brazil’s Opt-Out Threshold Provisions was disclosed in the publicly filed [Stipulation of Settlement](#) at ¶¶ 62-63 and [Amended Stipulation of Settlement](#) at ¶¶ 54-55, respectively.

Moreover, PwC Brazil’s supplemental agreement carves out an exception for the non-settling Pacific Management Co. and affiliates (the “PIMCO Exception”). It provides, in relevant part:

If at any time before entry of the Judgment, the PIMCO Plaintiffs ... succeed in seeking leave of the Court to amend or otherwise file a complaint against PwC Brazil relating to investments in Petrobras during the Class Period, the Settlement Fund shall refund PwC Brazil 65% of the amount of monies the PIMCO Plaintiffs would have received had they been Settlement Class Members and filed a claim with the Claims Administrator as part of the claims administration process.

Unlike the Opt-Out Threshold, this type of provision is not generally part of an undisclosed supplemental agreement.

The third supplemental agreement concerns attorneys’ fees—requiring payment of up to 50% of attorneys’ fees, or a maximum of \$142,250,000, awarded by the District

Court no later than ten days after judgment entry. In order to receive attorneys' fees beyond this amount prior to judgment entry, Class Counsel must obtain a letter of credit from a financial institution satisfactory to Petrobras. However, if it is later determined that Class Counsel is not entitled to fees and expenses for whatever reason, each attorney may be held personally liable.

The parties first jointly requested that the agreements remain confidential during a conference call. Following Judge Rakoff's initial denial, Plaintiffs' counsel transmitted the agreements to the Court accompanied by a written final plea for filing them under seal based on "strategic reasons." However, Judge Rakoff could not be swayed—opining that "the parties' and their counsels' strategic concerns should play no role in the Court's determination of whether or not such documents should be sealed," and that "the Court should be guided by the basic principle that all material parts of a proposed class action settlement should be available for public review and comment."

Judge Rakoff's decision to publicize the supplemental agreements concerning the Opt-Out Threshold Provisions and attorneys' fees likely comes at somewhat of a surprise to Class Counsel as it is common and reasonable to file such provisions under seal. In publicizing the supplemental agreements before the opt-out deadline, Judge Rakoff released information that settlement objectors likely find very helpful. In theory, an objector or group of objectors with knowledge of the supplemental agreements and a 5% stake in the outcome now have exceptional leverage in their attempt to prevent settlement. So, while Judge Rakoff understandably deemed it ironic, it is not difficult to identify the parties' "strategic reasons" for attempting to conceal this information and maintain settlement stability.

That said, the Court was certainly justified in expressing concern regarding secret side deals and ordering disclosure of the PIMCO Exception, which leaves open the possibility that the Settlement Fund may need to refund 65% of the money that the PIMCO Plaintiffs would have received if they joined the Settlement Class. Such a provision is undoubtedly material to potential Settlement Class Members and should be disclosed.

©1994-2019 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.

**Source URL:** <https://www.natlawreview.com/article/petrobras-court-s-denial-plaintiffs-request-confidential-treatment-opt-out>